Nos. 861-862-863

IN THE

Supreme Court of the United States

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 861-862-863

UNITED STATES OF AMERICA, *Petitioner*

v.

THE MIAMI TRIBE OF OKLAHOMA, ET AL. (No. 861)

THE CROW TRIBE OF INDIANS (No. 862)

THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA, ET AL. (No. 863)

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

JURISDICTION

No. 863 is Out of Time.—In No. 863, the judgment of the Court of Claims was entered on November 2, 1960. No motion for rehearing was made. A "Motion to Vacate Order" not requesting any alteration of the rights adjudicated between the parties (erroneously characterized as a "motion for rehearing" at the top of

p. 2 in the petition for certiorari) was overruled on January 18, 1961. Copies of the motion and argument in support thereof are appended to this brief. Since the motion did not toll the time for bringing the petition for certiorari (*Department of Banking* v. *Pink*, 317 U.S. 264, 266, rehearing denied, 318 U.S. 802) the petition for certiorari in No. 863 is not timely.

Although the motion is entitled a "Motion to Vacate Order", the title does not adequately indicate the nature of the relief which the Government sought in that motion. It was asking the Court of Claims to vacate the simple order which the court had entered, and, instead, to write a formal opinion giving in detail the reasons for its determination. In its "Memorandum in Support of Motion to Vacate Order", the Government devoted the entire argument to the proposition that the Court of Claims should vacate the order *for the purpose of writing an opinion.*

In no place in its argument did the Government suggest that the court should *change* its determination; it argued only that the writing of an opinion would be salutary. Even if the Court of Claims had *granted* the motion and written an opinion explaining the reasons for its decision, the result would not have been affected and, under the decisions of this Court, the motion was not such a motion as would affect the time in which the Government was required to bring its petition for certiorari.

In *Commissioner Int. Rev.* v. *Bedford's Estate*, 325 U.S. 283, this Court held that the date of judgment, not the date of the *opinion*, marks the commencement of the period for filing certiorari. See also *Angelus Milling Co.* v. *C.I.R.*, 325 U.S. 293, 295 note, rehearing de-

nied, 325 U.S. 895. Thus, the Government's request for an opinion cannot affect the commencement date.

The difference between a motion for reargument or rehearing which tolls the time for bringing certiorari and the kind of motion which petitioner made before the Court of Claims is set forth in *Department of Banking* v. *Pink*, 317 U.S. 264, 266-267, rehearing denied, 318 U.S. 802,

> "A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. Here no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended. Accordingly we must deny the petition for certiorari on the ground that it was not filed within the time provided by law."

In *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, this Court also emphasized that *change in result* was the test by which the question of commencement of the period is to be tested.

QUESTION PRESENTED

Under Clause (3) of Section 2 of the Indian Claims Commission Act, covering claims based upon land cessions made for unconscionable consideration, should the Government's promise to make payments in the future be valued as of the same date as the valuation of the conveyance by the Indians?

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, chapter 959, 60 Stat. 1049, 1050 (25 U.S.C. § 70a) provides as follows:

> "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission."

* * * * * * * * *

STATEMENT

In each of these three dockets the respondent Indian tribe has claimed that the consideration paid by the Government for a tribal land cession under a treaty was unconscionable (Ind. Cl. Comm. Act, Sec. 2(3), *supra*). Under each treaty the consideration payable by the Government consisted in part of future installments of money, goods or services payable for a long period after the treaty date.

The Indian Claims Commission in each case valued the land as of the treaty date but valued the consideration payable for the land as of the dates when the respective payments were due—that is, the Government was credited with the aggregate of all future installments, even though payable long after the treaty date.

In each case the Court of Claims reversed, holding that the consideration, like the land, should be valued as of the treaty date and that the Government should be credited with no more than the treaty-date value of installments payable in future.[1]

(a) **No. 861, Miami.**—By Treaty of June 5, 1854, 10 Stat. 1093, in consideration of a cession of 254,158.34 acres of land in Kansas,

> "the United States agree to pay to the Miami tribe of Indians the sum of two hundred thousand dollars, in manner as follows, viz: twenty annual installments of seven thousand five hundred dollars [commencing October 1, 1860] . . . and the remaining fifty thousand dollars shall be invested . . . for the good of the tribe . . ." [Art. 3.]

[1] The Court of Claims was not divided on this issue; the dissenting opinions filed in Nos. 861 and 862 related to other issues on which the Government does not seek review.

The Indian Claims Commission valued the land as of 1854 at $1.25 per acre, or $317,697; and valued the consideration at the recited figure of $200,000, making no allowance for the fact that 75 per cent of this sum was not payable until years after the treaty date. (Pet. No. 361, p. 46.) The Commission concluded that the disparity between the treaty date value and the recited consideration was not such as to render the consideration unconscionable, and denied recovery. (Pet. No. 861, pp. 52-55.)

The Court of Claims reversed. It accepted the Commission's valuation of the land but rejected its valuation of the consideration. It held:

> "The payment of $50,000 to be held at interest had a treaty-date cash value of $50,000. But $150,000 payable in twenty yearly installments of $7,500 commencing six years after the treaty date had a treaty-date value of only $71,974.23, which was the then present value of the right to receive such payments, on standard annuity tables, computed at 5% interest rate. The treaty-date value of the consideration which the Miami Tribe received was therefore $50,000 plus $71,974.23, or $121,974.23.
>
> * * * * *
>
> "The Miami received $121,974.23 for land which the Commission found to be worth $317,697.93. This is unconscionable consideration. . . ." (Pet. No. 861, pp. 19-20).

The same treaty provided for payment by the Government of a recited consideration of $421,448.68 for the commutation of permanent annuities that had a capital value of $530,800. The Court of Claims held that the Indians were entitled to the difference between the capital value of $530,800 and the value of the commutation payments. However, since a portion

of these payments were payable after the treaty date, the court held that the treaty-date value of these payments was not the recited figure of $421,448.68 but only $412,563.50, and awarded the Indians the difference between $530,800 and $412,563.50, or $118,136.[2] (Pet. No. 861, p. 25).

(b) **No. 862. The Crow Case.**—Of the some 38,531,174 acres of land which the United States had earlier[3] recognized as belonging to the Crow, they ceded 30,530,764.8 acres pursuant to the Treaty of May 7, 1868, retaining the balance for their diminished reservation. The lands they ceded had a value on the treaty date of 40¢ an acre, totaling $12,212,305. In exchange for the Crow cession the United States promised to pay the Crow a miscellaneous lot of goods, services and money to be paid and delivered in installments over varying periods of years. Between 1869 and 1932, a period of sixty-four fiscal years, the United States ultimately paid out some $1,644,585.49, pursuant to the 1868 Treaty. Since the transaction is being compared, as to the consideration given and received by each side, as of 1868, it has been the Crow Tribe's contention that the 1868 value of the Government's promise was that sum of money which, put at an appropriate rate of interest[4] on May 7, 1868, would be suffi-

[2] Petitioner appears to challenge only so much of this award as results from reducing the credit allowed to the Government from $421,448.68 (the recited consideration for commutation) to $412,563.50 (the treaty-date value of the commutation payments).

[3] Treaty of Fort Laramie, 11 Stat. 749, 2 Kapp. 594.

[4] An appropriate rate of interest is 5% simple interest, which was borne by Indian moneys (R.S. § 2096, 25 U.S.C. § 158) and other trust funds held by the United States where interest at a different rate was not required by the particular treaty (R.S. § 3659, 31 U.S.C. § 547a).

cient, using principal and income, to cover the yearly payments which were in fact made through 1932. That sum of money is $1,111,768.07. This contention was rejected by the Indian Claims Commission since "The same result would be reached if interest were added as part of the claim, but in either case it would be interest"—which cannot be recovered in the absence of express provision. (Pet. No. 862, p. 44.)

The Court of Claims reversed, without dissent as to this issue, since "the consideration which the Indians receive, like the lands which they surrender, must be valued as of the date of the treaty." (Pet. No. 862, p. 23). It denied that this was allowing the Indians interest, a payment for the use of their money, and emphasized that "All we do here is determine the value of what the Indians received in 1868. The fact that a figure representing interest must be used to calculate the 1868 value represented by a later payment does not make this an award of interest." (Pet. No. 862, p. 24.) It modified the judgment allowed by the Indian Claims Commission to increase it by the difference in value between the value of the land conveyed and the value of the promise which the Government gave of future performance. (Pet. No. 862, p. 24.)

(c) **No. 863, Absentee Shawnee.**— On May 10, 1854, the parties entered into a treaty by the terms of which the Shawnee Indians ceded certain lands in eastern Kansas to the United States. (10 Stat. 1053). In consideration for the cession, the United States agreed to pay the Shawnees $40,000 as of the treaty date (to be invested at five per cent interest for the purposes of education), $100,000 each year in October of 1854, 1855, 1856, 1857, 1858, 1859, and 1860, and a final payment of $89,000 in October 1861.

During the negotiations preceding the treaty, the Indians preferred payments of the consideration to be made in a shorter period of time than proposed by Commissioner of Indian Affairs Manypenny. In reporting on the respective positions of the negotiating parties to his superior, the Secretary of the Interior, on May 6, 1854 (five days before the date on which the treaty was executed), Commissioner Manypenny stated:

> "My proposition, *if reduced to a cash payment*, would be upwards of 40 cents, and theirs upwards of 50 cents per acre." (Claimants' exhibit 291, emphasis supplied.)

The value of the consideration, thus "reduced to a cash payment" by the Court of Claims, is in fact "upwards of forty cents per acre"; namely 45.22¢ per acre.

The Court of Claims found that the Commission had erred in valuing the consideration by totaling the payments, thereby overvaluing the consideration by $193,734.34, and remanded the cause to the Commission with directions to increase the award by that amount. (Pet. No. 863, p. 7.) It is of this determination which petitioner seeks review. The remaining determinations of the Commission, affirmed by the Court of Claims, including the valuation of the land at $1,938,464, the determination that the consideration was unconscionable, and that the Shawnee Nation is entitled to recover the difference between the fair value of the lands and the consideration paid, are not sought to be reviewed.

ARGUMENT

1. **The cases do not involve any conflict of decisions; the Court of Claims has not awarded interest against the Government, nor has it allowed a penalty or "additional compensation equivalent to interest"** (Pet. No. 861, p. 2).—These decisions do not disturb established principles forbidding the allowance of interest against the Government in the absence of statutory authorization or a taking under the Fifth Amendment. Nothing more was done than to determine the value of the Government's consideration for land cessions, in order to dispose of unconscionable consideration claims under clause (3), Section 2, of the Indian Claims Commmission Act. None of the many cases cited by petitioner involves anything remotely similar.

That which the Court of Claims has done is expressly directed by statute. Clause (3) of Section 2 of the Indian Claims Commission Act directs the determination of "claims which would result if the treaties . . . were revised on the ground of . . . unconscionable consideration." One cannot determine whether consideration payable under an Indian treaty is unconscionable without comparing the value of the cession with the value of the consideration agreed to be paid for it. The Court of Claims held that such a comparison requires both land and consideration to be valued as of the same date. That conclusion is unassailable. Petitioner would not venture open disagreement with it, but by affixing the epithet "interest" to the computation of present value it seeks, in effect, to have the Indians' cessions valued disparagingly as of the early treaty dates and yet have its promise valued advantageously as of future dates of performance.

In each treaty the consideration consisted in part of the promise of deferred payments The issue was

whether such consideration should be valued as if all the installments had been paid in cash on the treaty date or valued according to the actual worth on the treaty date of a promise to make future payments. The Court of Claims concluded that the latter premise had to be used in determining a claim of unconscionable consideration under Section 2(3) of the Act. That conclusion was manifestly sound.[5] But even if there were room for doubt, it would concern only this peculiar type of claim under this particular, narrow Act and has nothing to do with the rule proscribing recovery of interest against the Government as a penalty or additional damages for delay in payment.

The Indians do not complain of any detention of money under the treaties; they do not complain that treaty payments should have been made sooner than they were. The only money belatedly paid is the difference between the value of what the Indians got by their treaties and what they should have received—the amounts represented by these judgments. And no interest has been allowed for delayed payment of these amounts, though it perhaps ought to have been.

The lands were ceded in 1854 and 1868, for which the Indians received only a fraction of their worth. Over the years they have been denied the use of the additional money they should have been paid. To make them whole, Congress might well have authorized re-

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[5] Fixing the present worth of future payments is a perfectly ordinary concept. The Commissioner who negotiated the treaty for the Government in No. 863 fully understood it, as evidenced by his report that his bargain to pay the Indians the agreed amount over an extended period of time would cost the Government less than the Indians' request that the same amount be paid over a shorter period of time. Claimant's Exhibit No. 291 in Docket No. 863, quoted *supra*.

covery of the difference which should have been paid plus interest to compensate for the lost use of that money. Had it done so, these judgments would have been increased fivefold. But Congress has withheld that complete measure of restitution and permitted the Indians to recover now only what they ought to have received a century ago. This is all they got by the awards below. The argument that they have received damages for delayed payment has a ring of cynicism.

2. **The decisions below do not involve any question of general public importance.**— The issue which the petitioner seeks to have reviewed could arise only under the peculiar provisions of Section 2(3) of the Indian Claims Commission Act, covering claims for unconscionable consideration arising prior to 1946. The petitioner strains to give the problem broader implications.

It is mistakenly asserted that the ruling may affect cases arising after 1946, under the Court of Claims' continuing jurisdiction over Indian claims provided by 28 U.S.C. § 1505. But the most cursory reading of that provision will show that continuing jurisdiction as to future cases does not extend to unconscionable-consideration claims.[6] And lacking an occasion to

[6] Jurisdiction under 28 U.S.C. § 1505 is limited essentially to cases arising under the Constitution, laws or treaties of the United States—a grant of jurisdiction parallel to that exercised by the Commission under clause (1) of Section 2 of its Act and notably short of the provisions of clause (3) under which these cases were brought. The language of § 1505, carried forward from the traditional pattern of special jurisdictional bills, has been repeatedly construed as giving the court no power to question the fairness of treaty provisions. *Crow Nation* v. *United States*, 81 C. Cls. 238 (1935). It was for this reason that express language as to "unconscionable consideration" was written into clause (3) of Section 2. It is totally lacking in 28 U.S.C. § 1505.

value consideration, the present question could never arise.

Equally spurious is the argument that these decisions might affect "offsets" and "payments on the claim" in other cases. "Offsets" are not involved in the computation of a claim on the merits. They are unrelated gratuities which are set off (as they were here) after the amount of plaintiff's claim has been determined.[7] And it is settled too well for argument that these gratuities, to the extent allowed, must be subtracted at face value. They were so deducted in these cases and continue to be so handled in the Court of Claims and the Indian Claims Commission.

Similarly a "payment on the claim"[8] has nothing to do with the valuation of treaty consideration. It concerns a partial payment on a claim that has previously matured. The payments made by the Government in these cases were in satisfaction of the treaty consideration and not payments on these claims for amounts over the treaty consideration needed to make up what should have been paid in good conscience.

Petitioner's most strained argument is that these decisions might affect non-Indian cases, like *United*

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[7] Section 2, Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1050 (25 U.S.C. § 70a):

". . . the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant. . . ."

[8] *Ibid.*: "In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, . . ."

States v. *Hotel Co.*, 329 U.S. 585, which involved simply a dispute as to the amount owed the Hotel Co. for a building constructed for the United States under contract.[9] There was no question of deferred installments and no occasion to compute the present value of the Government's consideration under the contract. Lacking that—and that element will be inevitably lacking in any case save a case arising under Section 2(3) of the Indian Claims Commission Act, since Congress has not eleswhere authorized jurisdiction to re-examine the fairness of contracts made with the United States—there is not the remotest possibility that the rule of these cases could have any effect on cases of the type cited.

The Government makes an exaggerated argument that this issue will affect "almost every claim now pending under the Indian Claims Commission Act." (Pet. No. 861. p. 9.) It neglects to point out that unconscionable-consideration claims are only one of numerous types of cases filed under the Act, including claims (1) for takings under the Constitution, (2) for breach of treaties, statutes or agreements, (3) for revision of treaties on grounds of fraud, duress, or mistake, (4) for land taken without payment of consideration agreed to by the Indians, and (5) for unfair or dishonorable dealings, in none of which the present value of consideration will be an issue. Even within the category of unconscionable-consideration cases,

[9] Because the statute in that case spoke of "just compensation," the Court of Claims had allowed interest, plainly as additional damages for delay in making payment resulting from the dispute as to the amount due under the contract. This Court reversed, holding that the statutory words did not authorize an award of interest as damages for delay in payment, except where there had been a taking under the Fifth Amendment.

there are many where the Indians received at the time of cession a single payment or a permanent annuity,[10] thereby avoiding the issue of these cases. Thus, only in the restricted event of (a) an Indian claim for unconscionable consideration, (b) which had arisen prior to 1946, (c) involving a promise to pay in deferred installments, will the rule of these cases be relevant.

3. **The decisions below do not create any problems in the interpretation or administration of the Indian Claims Commission Act.**—Considering that appellate responsibility for questions arising under the Indian Claims Commission Act was vested primarily in the Court of Claims,[11] and considering the special competence and experience of the Court of Claims in Indian claims matters, its decisions should be reviewed by this Court only where they might frustrate the basic purpose of the Act, or make its administration by the Commission unmanageable, or where manifest injustice has been

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[10] See, *e.g.*, the earlier *Miami* decision, ... Ct. Cl. ..., 175 F. Supp. 926, 955-956 (1959), where the Court of Claims held that the value of consideration in a treaty providing for a perpetual annuity had to be the capitalized value of the annuity at the treaty date. It is now conceded that discounting to determine present value is appropriate in perpetual-annuity cases. Pet. No. 861, p. 8 at n. 4. It is difficult to see why a different rule should apply merely because the deferred annual payments are limited in number. See opinion of the court below, Pet. No. 861, p. 19.

[11] Congress vested trial jurisdiction in the Commission and appellate jurisdiction in the Court of Claims. The Commission's findings of fact are "conclusive" if "supported by substantial evidence," and on appeal the Court of Claims has the "exclusive jurisdiction" to test the substantiality of evidence and the power to determine the validity of questions of law decided by the Commission. Questions of law are subject to further review by this Court on writ of certiorari. Indian Claims Commission Act, *supra*, Section 20, (25 U.S.C. § 70s).

done. No such condition is presented here. Moreover, since in this case the Court of Claims acted in its appellate capacity, this is not the same situation as with prior Indian claims under special jurisdictional acts, or claims such as *Tee-Hit-Ton*[12] under the general jurisdiction of the Court of Claims (28 U.S.C. § 1505), where there was no intervening appellate tribunal and this Court afforded the only review.

CONCLUSION

The writs of certiorari should be denied.

Respectfully submitted,

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[12] *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 9-59

THE UNITED STATES OF AMERICA

v.

THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA and RILEY M. HOOD on behalf of THE SHAWNEE NATION

Motion to Vacate Order

The defendant by its Assistant Attorney General moves the Court: (1) to vacate the Order entered in the above entitled case on November 2, 1960, and (2) to consider and write an opinion on the important and novel problems of law presented by the Government in this case which will have serious and far-reaching effects on the administration of the Indian Claims Commission Act.

A memorandum of Points and Authorities is attached hereto in support of this motion.

PERRY W. MORTON
Assistant Attorney General

RALPH A. BARNEY
Attorney

Memorandum in Support of Motion to Vacate Order

FACTS

This was an action by the Absentee Shawnee Indians to recover the value of approximately 1,400,000 acres in Kansas, ceded to the United States by the Treaty of May 10, 1854, 10 Stat. 1053. On June 19, 1958, the Indian Claims Commission made findings of fact and wrote an opinion to the effect that the value of the land was $1,938,464.00, and that the consideration of $829,000.00 was unconscionable

(Appendix, Appeal Docket 9-59, pp. 6-34).[1] Allowable offsets and counterclaims were stipulated to be $33,860.32.[2] Judgment was entered by the Commission on July 27, 1959, for the sum of $1,075,603.68.[3]

From this final judgment the United States appealed and the tribe filed its cross appeal.

On March 17, 1960, the United States filed its Brief as Appellant, and on May 20, 1960, filed its Reply Brief to that of the Shawnees which had been filed on April 22, 1960.

The United States presented to this Court the following questions:[4]

> Whether the refusal of the Commission to dismiss this proceeding and its conclusions as to value and unconscionable consideration as of 1854 are erroneous because:
>
> (1) It failed to find or consider that the agreed price or consideration was fully and freely negotiated in the light of all facts then apparent.
>
> (2) It erroneously rejected all competent evidence including the facts existing in 1854 and the factual analysis upon which expert opinions were based.
>
> (3) Its conclusions of value and unconscionable consideration are based on errors of fact and law and are supported by no fact of record or in foresight in 1854.
>
> (4) The Commission failed to make adequate findings of fact.

As to the first point the Government pointed out at reconsiderable length and with quotations from the record

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[1] Hereafter cited as App. p. ....

[2] App. p. 5.

[3] App. p. 2.

[4] Appellant's Br. p. 3.

the history of the negotiations of the Treaty of 1854 (Br. pp. 4-14).

On the second point in the brief (and on the oral argument) the Government contended that (Br. p. 33):

> This case presents to this Court for the first time the question whether the Indian Claims Commission may in fact disregard the testimony of qualified witnesses and in the absence of other competent evidence arrive at its own unsupported conclusion of value.

We referred to the fact that (1) the Government offered the evidence of two qualified real estate appraisers who testified to the value of the land and (2) the single witness for petitioners was not a real estate appraiser nor did he express any opinion as to the value of the land (Br. pp. 33-34).

The Government then analyzed the findings and the opinion of the Commission in the light of decided cases, including some by this Court (Br. pp. 35-40).

At pages 41-48 we quoted extensively from the opinions of the Circuit Courts of Appeal of the 6th and 8th Circuits to the effect that the triers of fact—in this case the Commission—"may not substitute their inexperienced opinions for those of witnesses with special knowledge" (Br. p. 41) and that where testimony of competent witnesses was unimpeached it "should have been accepted by the Board [of Tax Appeals] in a matter in which the Board itself had no knowledge or experience upon which it could exercise an independent judgment." (Br. p. 42). The argument on this point was supplemented by our Reply Brief (pp. 16 *et seq.*). Also, during the oral argument to this Court, counsel for the Government amplified and discussed this contention.

Also, the Government contended that under the decisions of this Court the findings of fact by the Commission were wholly inadequate (Br. pp. 51-58).

Not one of these matters was considered by this Court. It would appear from the Order of November 2, 1960, that the Court considered only one matter (which was presented by the Tribe)—the amount of the consideration to which the Government was entitled to credit.

Argument

It is of course well known to this Court that the valuation of lands in Indian Claims cases is one of the most important aspects of this difficult and complicated litigation. In fact, it is on the valuation of the land that the question of ultimate liability is determined. As indicated in this Court's opinion in *Uintah & White River Utes* v. *United States*, 139 C. Cls. 1 (1957), the valuation of a large area of land—973,777 acres in that case—would, even as of today, be a task of great difficulty, and such a task is infinitely more difficult where as in that case "The relevant events and elements are those of fifty years [1905] ago." In the present case the valuation date is more than 100 years ago—1854. Obviously the task is not lessened.

But the Court has given no guidance for the future to the parties or to the Commission in similar cases. As we pointed out in our brief (p. 47):

> However, in several recent cases in which the petitioners are represented by the same counsel as in this case, the petitioners have introduced no opinion testimony as to the value of their lands, but have merely put in documentary evidence from which counsel then draw their own conclusions without any evidence concerning the relevancy of the data to the land in question.

So, as stated in the oral argument by counsel for the Government, the question is of importance in the future administration of the Indian Claims Commission Act. If the Commission may wholly disregard the opinions of

value expressed by qualified experts, there is no justification for the Government or the parties to spend the large sums of money which have been spent in the past in the employment of expert witnesses on value, or which will be spent in the future.[5] We believe that the Court should write an opinion on the issues thus presented in order to clarify this matter.

The Government believes that the Congress, in giving this Court appellate jurisdiction over decisions of the Indian Claims Commission, contemplated that the Court would render opinions for the future guidance of the Commission and the litigants. Section 20(b) of the Act provides, in part, as follows:

> * * * On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

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[5] By the Act of July 14, 1960, P.L. 86-651, 74 Stat. 509, the sum of $500,000 out of tribal funds of the "Indians of California" was appropriated for payment of expenses to be incurred in the litigation involved before the Indian Claims Commission. These "expenses" included the employment of appraisers to value the land in that case.

Since the Court did not write an opinion it is not known whether the Court has concluded that the findings if the Commission are or are not supported by substantial evidence. This is a matter of extreme importance in this case. The Government, as appellant, has asserted that there is a total absence of "substantial evidence" to support the Commission's finding.

The statute requires the Court to review the whole record or such portions of it as may be cited by either party. The appellant has pointed out in detail wherein the record is contrary to the findings of the Commission. Nowhere is there any evidence that the Court gave any consideration to these contentions.

In addition, we contended that "The findings of the Commission are obviously inadequate on at least two aspects of this case" (Br. pp. 51-58). No consideration appears to have been given to these contentions.

A Report of the Judicial Conference for the Third Circuit[6] made the following recommendations which we believe are applicable to this case:

> The Committee thinks that an appellate Court in every case should file an opinion that is sufficient to satisfy the litigants that the Court understood the facts and that the Court considered all of the controlling points raised by the losing party.

On the same subject Judge Samuel H. Sibley of the Fifth Circuit stated his views as follows:[7]

> A careful, reasoned opinion is a great aid to accuracy and correctness in decision. Many a decision has been

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[6] 34 Am. Bar Asso. Journal 668, 670 (August 1948); see also an explanation by Circuit Court Judge John J. O'Connell, 23 Temple Law Quarterly, p. 13 (July, 1949).

[7] Journal of the American Judicature Society, Vol. 25, p. 166 (April 1942).

> modified or challenged in the course of preparing such an opinion. They are much appreciated by the lawyers in the cases because the latter are not so free to fear the court did not study or grasp the case. * * *

In the case of *John T. Ayers* v. *United States*, 44 C. Cls. 48 (1908), this Court was faced with the reverse of this situation. There counsel for the claimant apparently contended that the Court should not write an opinion. In denying the correctness of that contention the Court pointed out that:

> * * * Every court has a right to give reasons for its official actions, and it is such a cardinal rule of Anglo-Saxon jurisprudence the principle has been extended to commissions, boards, and quasi-judicial bodies. * * *

The court said, in that case, that an opinion was "all the more necessary because rights are claimed under decisions which cannot be embodied in the findings," and that "if the questions here presented do not require a statement of the law applicable to the facts that court knows of no case that does."

So it is here. In the *Absentee Shawnee* case there has been presented a question which could have a profound effect on all future Indian Claims valuation cases. We believe that this Court should spell out its opinion on the important questions involved.

Respectfully submitted,

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November , 1960.

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

Nos. 861, 862 and 863

UNITED STATES OF AMERICA, *Petitioner*,

v.

MIAMI TRIBE OF OKLAHOMA (No. 861),
CROW TRIBE OF INDIANS (No. 862), and
ABSENTEE SHAWNEE TRIBE OF OKLAHOMA (No. 863),
Respondents.

CONDITIONAL MOTION FOR SEVERANCE OF UNCONTESTED PORTION OF JUDGMENTS AND REMAND TO INDIAN CLAIMS COMMISSION

Only if the petitions for writ of certiorari are granted in the above-captioned cases, respondents in those cases move the Court to sever and remand to the Indian Claims Commission, with directions to certify the determinations to Congress, the portions of the judgments being reviewed which are uncontested by petitioner. The uncontested portions are summarized in the memorandum which accompanies this motion.

In support of the foregoing motion, respondents respectfully show:

1. In each case the principal portion of the judgment of the Court of Claims is uncontested in this Court. In each case petitioner lost the appeal on issues no longer in the case, and each respondent won its own appeal on the issue of valuing consideration contemporaneously with the date of land cession, which is the only issue brought here

by petitioner. Petitioner's failure to bring before the Court the other issues was advertent. Thus, in the statement in No. 862 (Pet., p. 2), petitioner states, "While we believe that, as the two dissenting judges reasoned, this Court's decision in *United States* v. *Northern Pacific Ry. Co.*, 311 U.S. 317, shows that the tribe was not entitled to any recovery, *this petition is limited to the question stated above.*" As a result, pursuant to Rule 23(1)(c) of this Court, only the question as to valuing consideration will be considered by this Court.

(a) **As to No. 861**, there is uncontested in this Court a total of $209,433.51. Of $204,498.88 which is contested, only $86,800.95 directly involves the principle of present-value-of-consideration upon which the case turns.

(b) **As to No. 862**, the issue which is contested accounts for only 5% of the total judgment. The judgment of the Indian Claims Commission, after deducting consideration for the cession of land by respondent at the higher rate claimed by petitioner and after deducting offsets of gratuities, amounted to $9,710,167.77, which is no longer contested. The remaining portion ($532,816.93) of the judgment of $10,242,984.70 alone concerns the question raised by petitioner.

(c) **As to No. 863**, the judgment entered by the Indian Claims Commission after deducting consideration (on petitioner's theory) and offsets was $1,075,603.68. Only the remaining portion ($193,734.34) of the judgment below concerns the question raised by petitioner.

2. The final determinations in the Indian Claims Commission constitute judgments against the United States which must be certified to Congress by the Commission, whereupon pursuant to § 22(a) of the Indian Claims Commission Act (25 U.S.C. 70u) they "shall have the effect of a final judgment of the Court of Claims." After the judgment is lodged with the Treasury Department, Congress appropriates moneys to pay such determinations (the appropriation normally being added in the Senate late in

the consideration of an appropriation act suitable to carry such judgments.)

3. Unless this Court shall sever and remand the uncontested portions of the judgments under review, there is no chance that the unquestioned right of respondents to recover so much of their judgments below as is uncontested by petitioner can be acted upon by the First Session of the 87th Congress, and the matter will have to go over to next year and then await the ripening of a suitable appropriation act. As a result, these respondents will be deprived even further of the use of money to which in conscience they have been entitled for about a century, and the process of this Court will have been availed of with the result of a still further denial of justice. At the very least, respondents will have been deprived of interest on these uncontested amounts, which can only be earned after the moneys are appropriated. 25 U.S.C. § 161a; cf. 25 U.S.C. § 158. Particularly as to the Crow Tribe, there may well be even more serious human losses as a result of respondents' being unable to use and control their moneys in effective social and economic betterment of the tribal members and estate.

4. Counsel append hereto a memorandum dealing with the authority of the Court to accord the relief hereby requested.

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IN THE

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ABSENTEE SHAWNEE TRIBE OF OKLAHOMA (No. 863),
Respondents.

MEMORANDUM IN SUPPORT OF THE FOREGOING MOTION

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1. **Authority of the Court to Sever and Remand**—The relief requested is within the inherent power of the Court to control the course of proceedings before it, as the justice of the case may require.

There is no jurisdictional inhibition against an appeal on the contested part of a single judgment while the uncontested part has been paid. *Embry* v. *Palmer*, 107 U.S. 3, 8; *United States* v. *Dashiell*, 3 Wall. 688; *Gilfillan* v. *McKee*, 159 U.S. 303, 311-312; *Fifth Avenue Bank of N.Y.* v. *Hammond Realty*, 130 F. 2d 993, 994 (7th Cir. 1942); *Wollard* v. *Peterson*, 145 Kan. 631, 66 P. 2d 375 (1937). Compare the practice by which the defendant by *cognovit actionem* could stop the running of costs on the admitted

part of the judgment pending appeal or writ of error. *Cf., New Providence* v. *Halsey,* 117 U.S. 336, 339. The relief requested does not involve "splitting a cause of action" in the sense of permitting more than one suit or appeal on a single cause, for two suits would not result—there would proceed only that which is really contested.

As to the power of the Court to sever the uncontested part of a judgment, attention is invited to the former practice of summons and severance, by which a judgment against joint parties was severed as to a party not wishing to contest it on appeal. The purpose of this practice was "That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed." *Masterson* v. *Herndon,* 10 Wall. 416, 417; *Hardee* v. *Wilson,* 146 U.S. 179, 181; *Inglehart* v. *Stansbury,* 151 U.S. 68, 72; *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U.S. 169, 180. So here, severance is requested in order that the successful party may proceed with collection of that part of the judgment which respondent does not seek to have reviewed. This Court's Rule 46, which now dispenses with the formality of summons and severance and permits the separate appeal as a matter of course, is indicative of the favor in which "severance" is held where it will facilitate review of that which is really in dispute. As stated by this Court in *Ex parte French,*[1] 100 U.S. 1, 5; "The whole question is one of practice and not of statutory law."

Consistent with this spirit is the modern trend to permit partial summary judgment (F.R. Civ. Proc. Rule 56) and, in case of multiple claims, entry of final judgment on some or less than all of the claims if there is no just reason for delay. F.R. Civ. Proc., Rule 54(b).

Upon severance, this Court has the discretionary power to order a remand in terms appropriate to the justice

[1] Holding joint judgment in ejectment may be stayed as to some and execution ordered as to others, though all join in writ of error.

of the case. See *Washington Gaslight Co.* v. *Lansden*, 172 U.S. 534, 556; *Binney* v. *C.&O. Canal Co.*, 8 Pet. 214.

2. **Amounts Involved in the Severed Judgments.**—The uncontested portions of the judgments below, which should be remanded to the Indian Claims Commission with directions to certify to Congress pursuant to § 22(a), Indian Claims Commission Act (25 U.S.C. § 70u), are calculated as follows:

No. 861. There were two separate petitions by two tribal groups in the Indian Claims Commission, and both were dismissed. The Court of Claims reversed as to both, and directed the entry of judgments on separate counts as follows:

(a) Unconscionable consideration for Kansas Lands under the 1854 Treaty (Pet. pp. 15-20): The court below found that the two tribal groups received in total for lands valued at $317,697.93, promises of the Government worth $121,974.23. Since the Indian Claims Commission found they had received the expressed consideration of $200,000, the difference involved in the principle questioned by petitioner is only $78,025.77. But since the Commission also found that $200,000 was not unconscionable consideration for $317,697.93 (an issue upon which the court below did not pass) respondents in No. 861 do not question as to this item that the entire net judgment of $195,723.70 actually may depend upon the issue before this Court.

(b) Commutation of annuities. The court below (Pet., pp. 22-25) held the Indiana Miami to be entitled to 54.8% of the recovery of unconscionable consideration for commutation of annuities, or $64,738.80, and the Miami Tribe of Oklahoma to be entitled to the balance, or $53,397.70. Of the total of $118,136.50, the petition contests only $8,775.18, which is all that is involved in the present-value-of-consideration point (consideration of $421,438.68, found by the Commission, as against consideration of $412,663.50

found by the court below, Pet. p. 24). Deducting the $8,775.18 pro rata (54.8% - 45.2%) as required by the opinion below leaves judgments unaffected by the principle here as follows:

Indiana Miami	$64,738.80
Less 54.8% of $8,775.18	4,808.80
Unaffected by proceedings in this Court	$59,930.00
Miami Tribe of Oklahoma	$53,397.70
Less 45.2% of $8,775.18	3,966.38
Unaffected by proceedings in this Court	$49,431.32

(c) Interest on Misappropriated Funds. The court below (Pet. pp. 25-27) awarded a recovery on this item of $100,072.19, which is not involved in any way in the petition herein, and ought to be severed from the proceeding under review.

(d) Summary as to No. 861: The following should be severed:

Item (b), above:	
Indiana Miami	$ 59,930.00
Miami Tribe of Oklahoma	49,431.32
Item (c) above:	
Miami Tribe of Oklahoma	100,072.19
	$209,433.51

No. 862. The recovery as allowed by the Indian Claims Commission is not involved in the matters before this Court—only the modification of that judgment by the court below, reducing the consideration from $1,644,585.00 to $1,111,768.07, a difference of $532,816.93. The final judgment of the Commission, no part of which would be affected, (December 8, 1958, p. 212 of the unprinted record)

was for $9,710,167.77. This is the amount which should be severed. It is made up as follows:

1868 value of land ceded		$12,212,305.00
Deduct 1869-1932 value of consideration	$1,644,585.00	
Deduct offsets of gratuities	857,552.23	
Total deduction		2,502,137.23
Amount which should be severed		$ 9,710,167.77

No. 863. After consideration (on its theory) and offsets, the Indian Claims Commission entered a final judgment for $1,075,603.68, no part of which is involved in the question before this Court. This is the amount which should be severed, leaving only the $193,734.34 in controversy added through the modification by the court below.

Summary of amounts proposed to be severed and remanded:

No. 861, Indiana Miami	$ 59,930.00
Miami Tribe of Oklahoma	49,431.32
Miami Tribe of Oklahoma	100,072.19
No. 862, Crow Tribe of Indians	9,710,167.77
No. 863, Absentee Shawnee Tribe	1,075,603.68

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Nos. 861, 862, 863

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

THE MIAMI TRIBE OF OKLAHOMA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

ARCHIBALD COX,
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1. The respondents in No. 863 (*United States* v. *The Absentee Shawnee Tribe of Oklahoma, et al.*) contend (Br. in Op., 1-3) that the petition for a writ of certiorari in that case is untimely. The judgment of the Court of Claims was entered on November 2, 1960. The Government filed a timely motion requesting the court "to vacate the Order entered in the above entitled case on November 2, 1960," and to write an opinion (Br. in Op., 17). The motion was denied on January 18, 1961, and the petition was filed on March 31, 1961. The respondents argue that since the Government requested the court to vacate its order merely for the purpose of writing an opinion, the motion did not seek

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"any alteration of the rights adjudicated between the parties" (Br. in Op., 1) and, therefore, did not extend the time for petitioning.

There is no merit to this contention. "[T]he general rule [is] that where a petition for rehearing, a motion for a new trial, or *a motion to vacate*, amend, or modify *a judgment* is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion." *Leishman* v. *Associated Electric Co.*, 318 U.S. 203, 205 (emphasis added); *Southern Pac. Co.* v. *Sartoris*, 27 F. 2d 852, 853 (C.A. 9), certiorari denied, 278 U.S. 651. The Government's motion to vacate the judgment comes squarely within this rule. Had the motion been granted, there would have been no judgment of which review could have been sought.

The fact that the stated purpose for seeking vacation was to have the court write an opinion does not make the rule inapplicable. For any opinion, whether or not the decision was changed, would have had an important bearing on whether the government would seek review on the substantive issues of land valuation under the Indian Claims Commission Act. Since the Government's motion thus "was not addressed to mere matters of form but raised questions of substance" (*Leishman, supra*), it extended the time for petitioning. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177; cf. *Zimmern* v. *United States*, 298 U.S. 167, 169.[1]

[1] None of the cases cited by respondents compels a different result. The instant case presents no question as to whether an "opinion" constitutes an appealable "judgment," which was

2. On the merits, the respondents contend that the Court of Claims did not award interest, but merely determined "the value of the consideration agreed to be paid" for the land ceded by the Indians (Br. in Opp., 10). But whatever language is used to describe the action of the Court of Claims, the inescapable fact is that the court awarded the Indians something more than they were promised under the treaty because of the delay in paying them that amount. That, of course, is precisely the purpose for which interest is awarded—to compensate a litigant for delay in the payment of what is due him.

Respectfully submitted.

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Attorney.

APRIL, 1961.

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the issue in *Commissioner* v. *Estate of Bedford*, 325 U.S. 283, and *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293. *Department of Banking* v. *Pink*, 317 U.S. 264, held only that a motion to amend remittitur to state that a federal question had been presented and decided did not extend the time for petitioning, since such relief could not have effected "the finality of the judgment" (p. 266). *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, did not involve the effect of a motion to vacate the judgment at all. The question there was which of two judgments was the final one for purposes of determining the timeliness of the petition. The court held it was the first judgment, since the second one had not "disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality" (p. 212).

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MIAMI TRIBE OF OKLAHOMA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO CONDITIONAL MOTION FOR SEVERANCE OF UNCONTESTED PORTION OF JUDGMENTS AND REMAND TO INDIAN CLAIMS COMMISSION

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In the Supreme Court of the United States

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On its face, the action which the respondents seek does not appear objectionable. However, the suggestion would create a precedent which would apply, not only to Indian Claims Commission cases, but to all claims against the United States in the Court of Claims or in district courts. There may be objections, both jurisdictional and otherwise, to the adoption of such a practice. For example, the statutory provisions as to the content of the final determination of the Indian Claims Commission (25 U.S.C. 70r), the content of its report to Congress (25 U.S.C. 70t), and the effect of the report as a judgment of the

Court of Claims (~~28~~ U.S.C. 70u), would appear to preclude the suggested entry of two judgments. Compare 28 U.S.C. 2516–2519 as to Court of Claims judgments. The right to interest pending review by the Supreme Court has never been adjudicated. The various implications of the motion are therefore too important for summary treatment.

The respondents' motion is conditional upon the granting of certiorari. The United States will file a full response to the motion fifteen days after an order for certiorari is entered.

Respectfully submitted.

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APRIL, 1961.

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